Supreme Court, U.S.
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**October, 1995, Term**

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**GRETCHEN GETTER,**
**Petitioner,**

**vs.**

**WAL-MART STORES, INC.,**
**Respondent.**

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Where a District Court erroneously refuses to sustain a for-cause challenge to a potential juror in a civil case, and the challenging party has to use one of the peremptory strikes authorized by 28 U.S.C. § 1870 to remove the challenged juror, does the failure to sustain the challenge constitute reversible error per se, as held by the Court of Appeals for the Third Circuit, and as argued by the dissent in the instant case, or is the failure to sustain the challenge subject to a "harmless error" analysis, as held by the Court of Appeals for the Tenth Circuit in the instant case and by the Court of Appeals for the Ninth Circuit?

2. Are the three peremptory strikes granted by 28 U.S.C. §1870 a "substantial right" under 28 U.S.C. §2111 so that a trial court error impairing one party's right to use peremptory strikes in a federal civil trial may not be disregarded by the Courts of Appeals in rendering judgment on appeal, or subjected to harmless error analysis?

3. Does the erroneous denial of a challenge for cause to a potential juror in a federal civil trial, thereby causing the challenging party to use a peremptory strike to remove the juror constitute a deprivation of a property right in violation of the Fifth Amendment to the Constitution of the United States?

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner Gretchen Getter respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on September 21, 1995.

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## REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Tenth Circuit appears in *Getter v. Wal-*

*Mart Stores, Inc.*, 66 F.3d 1119 (10th Cir. 1995).

## JURISDICTIONAL STATEMENT

On September 21, 1995, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court for the District of Kansas in favor of Defendant Wal-Mart Stores, Inc. No petition for rehearing was filed by Gretchen Getter, Plaintiff-Appellant below. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. §1254, and 28 U.S.C. §2101(c).

## CONSTITUTIONAL AND OTHER PROVISIONS

U.S. Const., Amend. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. [Emphasis added.]

28 U.S.C. §1870:

In civil cases, each party shall be entitled to three peremptory challenges. Seveal defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

28 U.S.C. §2111:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

## STATEMENT OF THE CASE

### Jurisdictional Background

This case was originally filed by Gretchen Getter in the District Court of Atchison, County, Kansas, from which it was removed by Defendant Wal-Mart Stores, Inc. ("Wal-Mart") to the United States District Court for the District of Kansas, based on the diversity jurisdiction provisions of 28 U.S.C. §1332 and §1441. Mrs. Getter was a resident of Kansas, and Defendant Wal-Mart Stores, Inc. ("Wal-Mart") was a resident of Delaware with a principal place of business in Arkansas. A trial in the District Court resulted in a jury verdict in favor of Wal-Mart on February 3, 1993. On February 16, 1993,

Mrs. Getter filed her motion for new trial, which was overruled on July 6, 1993. Mrs. Getter filed her notice of appeal to the United States Court of Appeals for the Tenth Circuit was filed on July 12, 1993. The appeal to the United States Court of Appeals for the Tenth Circuit was under the authority of 28 U.S.C. §1291.

The judgment of the District Court was affirmed by the United States Court of Appeals for the Tenth Circuit on September 21, 1995. Mrs. Getter did not file a petition for rehearing. This Petition for a Writ of Certiorari is filed in ninety days of the date of the judgment affirming the District Court, pursuant to Supreme Court Rule 13.1.

**Factual Background**

This case arose out of a slip and fall accident in the vestibule of the Wal-mart store in Atchison, Kansas, on December 20, 1989, during inclement weather in which snow and ice was being tracked into the vestibule by store customers, and melting there. During the course of the voir dire of potential jurors, John Agin revealed that he was a stockholder in Wal-Mart; that he was at that time unemployed, and that his wife was head sales clerk at the Wal-Mart store in which the accident occurred. In response to a question by the trial court about whether he could be fair and impartial, Mr. Agin said he could be, and also said, "I have biases both for and against Wal-Mart, knowing what I know about it." [Generally, Appendix 29 to 32.] Mrs. Getter challenged Mr. Agin for cause, and the District Court denied the challenge. [Appendix 32.] The issue of the validity of the denial of the for-cause challenge of Mr. Agin was preserved for appeal, and was briefed and argued to the

Court of Appeals.

## REASONS FOR GRANTING WRIT

A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be granted because the decision of the Tenth Circuit in this case is in conflict with decisions in other circuits on the same important matter: the proper remedy when a District Court erroneously fails to sustain a challenge for cause to a potential juror in a federal civil trial, and the challenging party's right to exercise the three peremptory challenges authorized under 28 U.S.C. §1870 is impaired by having to use one to remove a potential juror who should have been stricken from the panel for cause.

This case also raises the issue of whether conducting a "harmless error" analysis following a determination that the District Court abused its discretion by denying a for-cause challenge is mandated by this Court's decision in *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273 (1988).

In June, July and September of 1995, three of the Courts of Appeals ruled on similar but not identical issues relating to impairment of the right to exercise peremptory strikes of potential jurors in federal trials: *United States v. Annigoni*, 57 F.3d 739 (9th Cir. 1995); *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995), and *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119 (10th Cir. 1995).

*Annigoni* dealt with a challenge by the prosecution to a criminal defendant's peremptory strike of an Asian-American potential juror, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986). The District Court observed that the man

against whom the peremptory strike was used was Asian, and as the Ninth Circuit said, "moved from its observation to the conclusion that the defense had been motivated by racial prejudice." *Annigoni* at 743. The Ninth Circuit found, however, that there was nothing in the record from which the trial court could properly have concluded that the strike was racially motivated, particularly where the explanation given by the defense was race neutral. *Id. Annigoni* involved criminal prosecution for fraud connected with a limited real estate partnership, and the defense explanation for the peremptory strike was that they did not wish to have a juror on the panel who had a prior connection with litigation over a limited real estate partnership.

After finding an abuse of discretion in the trial court's ruling on the *Batson* challenge, the Ninth Circuit proceeded to overrule its prior decisions holding that an error which restricted the exercise of peremptory strikes required an automatic reversal, *e.g.*, *United States v. Turner*, 558 F.2d 535, 538 (9th Cir. 1977). *Id.* The Ninth Circuit said that two factors required abandonment of the automatic reversal requirement: (1) the "sea change" in the use of peremptories resulting from this Court's opinions in *Batson*, *supra*, *Edmonson v. Leesville Concrete Company*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed.2d 660 (1991), and *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed.2d 33 (1992) and (2) that a "new rule has been announced as to the kind of error that mandates reversal of a verdict after trial." *Id.* at 744. The "new rule" relied on by the Ninth Circuit is that:

> ...apart from cases where the evidence does not justify conviction beyond a reasonable doubt, the only cases where reversal is mandatory are those

> in which structural error occurred—the judge was biased, counsel was incompetent, cases of this sort. *Brecht v. Abrahamson*, — U.S. —, —, 113 S. Ct. 1710, 1717, 123 L. Ed.2d 353 (1993). In other cases the axiom holds that the defendant is entitled to a fair trial not a perfect one, and any herror may be assessed for its harmfulness.

*Id.* at 745.

The Ninth Circuit concluded that erroneous denial of a peremptory did not create a structural defect in the trial:

> There is language in the past decisions of the Supreme Court that suggests [erroneous denial of a peremptory creates a structural defect]. The peremptory is "one of the most important rights secured to the accused," *Pointer v. Untied States*, 151 U.S. 396, 408, 14 S. Ct. 410, 414, 38 L. Ed. 208 (1894). It is "an essential part of the trial," *Lewis v. United States*, [146 U.S. 370, 376, 13 S. Ct. 136, 138, 36 L. Ed. 1011 (1892)]. The persistence of peremptories demonstrates a belief that they are "a necessary part of trial by jury." *Swain v. Alabama*, [380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed.2d 759 (1965)].
>
> At the same time the Supreme Court has held that peremptories are not required by the Constitution; Congress may regulate their number. [Citation omitted.] Peremptories are "in the nature of a statutory privilege," [citation omitted]. They are "not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." [Citation omitted.] Peremptories are now given by federal rules.

> They do not have a constitutional status, they do not have a structural status. The impartiality of a jury is not destroyed where, as here, a peremptory is in good faith erroneously denied.

*Id.* at 745. The Ninth Circuit also relied on this Court's opinion in *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988) to support its conclusion.

In contrast, the Third Circuit held in *Kirk* at 157-158:

> We hold that compelling a party to use any number of its statutorily-mandated peremptory challenges to strike a juror who should have been removed for cause is tantamount to giving the party less than its full allotment of peremptory challenges. Because 28 U.S.C. §1870 requires that each party shall be entitled to three peremptory challenges, "a denial or impairment" of that statutory right occurs whenever a party exercises a peremptory challenge to strike a prospective juror for cause....
>
> ... The common law rememdy of per se reversal has a long history and tradition in our judicial system. As early as the 1890's, the Supreme Court held in *Gulf, Colorado & Sana Fe Ry. Co. V. Shane*, 157 U.S. 348, 15 S. Ct. 641, 39 L. Ed. 727 (1895), that to "impanel a jury in violation of law, and in such a way as to deprive a party of his right to peremptory challenge, constitutes reversible error." [Citation omitted.] In *Shane*, a civil defendant claimed that the trial judge committed error by failing to adhere to an Arkansas statute that provided each party three peremptory strikes to be used on a list of eighteen prospective jurors. Because the trial judge confined

> the right to exercise peremptory challenges to only twelve prospective jurors, the Supreme Court concluded, without a showing of prejudice, that the trial court violated the statute. *Id.* Similarly, in *Harrison v. United States*, 163 U.S. 140, 16 S. Ct. 961, 41 L. Ed. 104 (1896), a criminal defendant argued that the trial judge erred in alloting him only three peremptory strikes, instead of the ten to which he was entitled under a federal statute. Because the defedant want to exercise five additional peremptory strikes, the Supreme Court reversed, observing that "[i]f [the defendant] was entitled to ten peremptory challenges, five persons unlawfully took part as jurors in his conviction. [Citation omitted.] Again, the Court did not require a showing of prejudice for this statutory violation.
>
> Continuing its analysis, the Third Circuit held that:
>
> > ...*Batson* did not reach the situation where the Equal Protection Clause is not implicated. Indeed, *Batson* did not overrule that portion of *Swain* which held that denial or impairment of a peremptory strike is per se reversible error.

*Id.* at 159. The Court then turned its attention to *Ross*, *supra*, concluding that it "is not controlling because [defendant] alleges a *statutory*, not a constitutional, injury." *Id.* at 160. The Third Circuit noted other decisions holding that denial or impairment of the right to exercise peremptory strikes constitutes reversible error per se: *United States v. Cambara*, 902 F.2d 144, 147 (1st. Cir. 1990); *Carr v. Watts*, 597 F.2d 830, 833 (2d Cir. 1979); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977); *United States v. Nell*, 526 F.2d

1223, 1229 (5th Cir. 1976). As additional support for its holding, the Third Circuit also referred to *United States v. Munoz*, 15 F.3d 395 (5th Cir.), *cert. denied*, — U.S. —, 114 S. Ct. 2149, 128 L. Ed.2d 876 (1994), in which the Fifth Circuit "expressed doubt as to whether *Ross* controls a case on direct appeal and further noted that reversal may be proper even though the error alleged a trial was not of constitutional magnitude." *Kirk* at 162, *Munoz* at 398, n. 1. The Fifth Circuit also said: "[w]hile peremptory challenges...may not be constitutionally required, it does not follow that a trial court's wrongful reduction of the number so provided is not reversible error on direct appeal." *Id.* The Third Circuit concluded:

> Finally, [plaintiff] argues that even if the requirement imposed by *Ross* of showing jury bias only applies to constitutional claims, its logic should nonetheless be extended to any statutory impairment claim, that is, a party should always be required to show that the jury that actually saw was biased. We decline to extend *Ross* in the absence of further guidance from the Supreme Court. We hold that the remedy for impairment or denial of the statutory right to exercise peremptory challenges is per se reversal without any requirement of proving prejudice.

*Kirk* at 163.

In the instant case, the majority of the Tenth Circuit panel, while recognizing that other circuits had concluded that erroneous denial of a for-cause challenge is reversible error per se, *e.g.*, *Cambara*, *supra*, and *United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989), *Getter* at 1122, focused almost exclusively on *Ross*, and *McDonough Power Equipment, Inc. v.*

*Greenwood*, 464 U.S. 548, 553, 104 S. Ct. 845, 848, 78 L. Ed.2d 663 (1984) ("[C]ourts should...ignore errors that do not affect the essential fairness of the trial.), to buttress its conclusion that this type of trial court error requires a harmless-error analysis. *Getter* at 1122-1123.

The Tenth Circuit applied the standards of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), to determine that because the District Court's error in this case was a non-constitutional error, it was harmless because it did not have a substantial influence on the outcome of the trial, and it did not leave the Court of Appeals with a grave doubt as to whether it had such an effect. *Getter* at 1123. The Tenth Circuit then concluded:

> In this case, the challenged juror did not serve on the jury because plaintiff used a peremptory challenge to remove him. Plaintiff does nto allege that the jury as seated was biased. Thus, the district court's refusal to remove Mr. Agin for cause did not have a "substantial influence on the outcome" of the trial, not does it leave us "in grave doubt as to whether it had such effect." Because plaintiff's right to an impartial jury was not infringed by the district court's erroneous denial of the for-cause challenge, we hold that the error was harmless.

*Id.*

The vigorous dissent in *Getter*, however, pointed out that this Court had expressly declined in *Ross* to rule on the broader question of whether there is a denial or impairment of the right to exercise peremptory challenges, if a party has to use one or more peremptories to remove jurors who should have been removed for cause, and there is no limitation on peremptories similar to

Oklahoma's statutory requirement that a peremptory be used to remove a juror a party believed should have been removed for cause in order to preserve the for-cause error for appeal. *Getter* at 1126-1127.

> The "broader question" which the *Ross* majority specifically avoided must be addressed and answered here. Simply stated, it is this: Is the right toa peremptory challenge under 28 U.S.C. §1870 one of the "substantial rights of the parties" under 28 U.S.C. §2111? The conclusionthat it must be, and that it is, is attested by federal case law from every early on. Perhaps the best exposition of the history, nature and character of the right to challenge peremptorily is contained in yet viable remains of [*Swain*]. Observations touching the peremptory challenge are as pertinent, as timely and as revealing of the essence of this "right" today as they were before and after *Swain* was modified in [*Batson*]. *Batson* only overruled *Swain* to the extent that it prohibits the exercise of a peremptory challenge for reasons which violate the equal protection guarantees of the Constitution.

*Id.* at 1127. Judge Campos concluded:

> My conclusion is twofold. First, I believe that losing a peremptory challenge because of an erroneous refusal to excuse for cause is a deprivation of property without due process of law in contravention of the Fifth Amendment. It impacts uon the processing of the litigant's cause of action, the litigant's "property," in a federal court. Thus I would not engage in a harmless error analysis as the majority does. Second, even if an erroneous denial of a challenge for cause does

> not implicate the Fifth Amendment, still the peremptory challenge accorded litigants in 28 U.S.C. §1870 is, nevertheless, a statutory right or privilege which carries with it all the essence, stature and dignity of the "substantial rights" which are the subject of 28 U.S.C. §2111. History and law teach that it has a rightful place and marches with that company. When a party is put to exhausting all peremptory challenges, one of which is used to remedy an erroneous denial of a challenge for cause, as occurred in this case, such ruling denigrates and diminishes this statutory right and is, therefore, reversible error.

*Id.* at 1129-1130.

As can be seen from the quoted portions of *Annigoni*, *Kirk* and *Getter*, and in the text of the full opinions themselves, the Courts of Appeals are in disarray over what to do when they conclude that a District Court has either erroneously denied a challenge for cause and forced a party to use a peremptory strike to remove a juror who should have been removed for cause, or when they conclude that a *Batson* challenge to a peremptory strike was improperly sustained or denied. The Fifth Circuit appears to be internally split, as well. For example, in *Nell*, *supra*, the Fifth Circuit held that the general rule was that it was reversible error per se to force a party to exhaust his peremptory challenges on persons who should have been excused for cause, *id.* at 1229. Yet in *United States v. Mendoza-Burciaga*, 981 F.2d 192, 197-198 (5th Cir. 1992), the Fifth Circuit said:

> On voir dire, one of the potential jurors identified herself as an employee at the detention center where the defendants were held. Under questioning by the district court, the woman indi-

> cated she knew nothing about the trial, could be fair, and could take instructions. Mendoza-Burciaga's challenge for cause was denied. Mendoza-Burciaga subsequently used a peremptory strike to remove the woman, and he appeals the denial of his challenge for cause.
>
> Mendoza-Burciaga makes no claim that he was prejudiced by having to use the peremptory challenge to strike the detention center employee rather than someone else. The judge's determination as to actual bias by jurors is reviewed for manifest abuse of discretion. [Citations omitted.] Here, where the judge took pains to screen the potential juror, there was no such abuse. Moreover, there was no harm to the defendants as the woman never served.

Indirectly, *Mendoza-Burciaga* raises the additional issue of the automatic *assumption* that because the juror who should have been removed for cause didn't serve anyway, following a peremptory strike, the jury was fair and impartial. The *Getter* majority assumed that the actual panel of jurors sitting on the case was impartial because no allegation was made that the resulting panel, following the erroneous refusal to exclude Mr. Agin for cause, was biased. The short answer to that assumption would appear to be from this Court's opinion in *Harrison*, *supra*, which held that where a defendant was prevented from exercising five peremptory strikes authorized by law, five persons were unlawfully seated on the jury which convicted him. The assumption of an impartial panel also raises the issue identified by both the *Getter* majority and dissent: just how *does* a party prove that the panel which results from an infringement of the right to exercise peremptory strikes

was biased to a degree requiring reversal, even though the bias did not rise to the challenge-for-cause level, or alternatively, how does a party in that position demonstrate prejudice sufficient to warrant reversal?

The *Getter* majority said at 1123, note 3:

> We are troubled that one result of our holding may be the creation of a formidable barrier to appellate review of denials of for-cause challenges. Unless a litigant's right to an impartial jury is infringed, erroneous denials of for-cause challenges are probably harmless errors. A litigant who challenges a prosective juror for cause is unlikely to allow such a juror to remian on the jury and will exercise a peremptory challenge. Thus, the litigant will not be able to argue that the jury which decided the case was partial. Of course, there may be instances in which a party can show that the erroneous denial of a for-cause challenge substantially affected the outcome of a trial. Such an instance, however, is not before us in this case.

Judge Campos' views on this subject were expressed at 1129:

> The "harmless error" analysis requires a party, in the "non-constitutional error" context, to make a showing that the error had a "substantial influence" on the outcome or leaves one in "grave doubt" as to wheter it had such effect. [Citation omitted.] In the peremptory challenge scenario a party must thus make a showing that while one set of juror brains decided against it a sest of slightly different juror brains would have decided for it. The processes and means for making such a showing are, of course, non-

existent. Thus, at the starting line this formulation forces a party to hit an impregnable wall before the starting gun goes off. This is sophistry.

The sharp split between the circuits in the very recent decisions of *Kirk*, *Annigoni* and *Getter*; the potential for even further splits as the Courts of Appeals which have not recently re-visited the issue of the remedy for erroneous denials of for-cause challenges do so, and do so in light of these three opinions; the uncertainty generated by the harmless error standard in terms of whether a party has any possibility whatsoever of being able to demonstrate prejudice warranting reversal; the potential that any attempt to make such a showing will require articulation—and testimony—by trial counsel and/or a party, explaining why "Juror X" would have been peremptorily struck if there had been no erroneous denial of a for-cause challenge, and the consequent necessity for establishing a standard of appellate review of the evidence relating to juror(s) who would have been peremptorily struck but were not, combine to provide a strong reason for the Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The split in the circuits is painfully obvious and can only widen as other Courts of Appeals analyze the remaining vitality, if any, of *Swain*, or the impact of *Batson* on peremptory challenges, or the effect of *Ross* in non-constitutional settings. To eliminate growing confusion on what remedy to apply when a District Court erroneously denies a challenge for cause and forces a party to use one of the available peremptory challenges to remove the juror who should have been removed for cause, this Court should resolve the issue by granting this Petition for a Writ of Certiorari to the

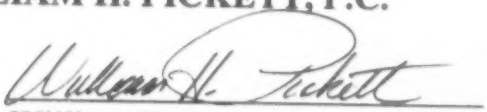
United States Court of Appeals for the Tenth Circuit.

## CONCLUSION

For all the reasons previously stated, Petitioner prays that the Court grant this request for a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, to review and decide all issues presented in this Petition.

Respectfully submitted,

**WILLIAM H. PICKETT, P.C.**

By: 

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

| | | |
|---|---|---|
| GRETCHEN GETTER, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| *vs.* | ) | No. 93-3210 |
| | ) | (D.C. No. 92- |
| | ) | 2005-KEV) |
| | ) | |
| WAL-MART STORES, INC., | ) | |
| | ) | |
| Defendant-Appellee.) | | |

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**JUDGMENT**
Entered September 21, 1995

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Before ANDERSON and TACHA, Circuit Judges, and CAMPOS, Senior District Judge.

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*The Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

This case came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the court is affirmed.

Entered for the Court

PATRICK FISHER
Clerk

By: /s/ L. Balzano
Deputy Clerk

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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|---|---|---|
| **GRETCHEN GETTER,** | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| *vs.* | ) | No. 93-3210 |
| | ) | |
| **WAL-MART STORES, INC.,** | ) | |
| | ) | |
| Appellee. | ) | |

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**APPEAL FROM THE UNITED STATES**
**DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**
(D.C. No. 92-2005-KEV)

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John R. Cleary (Karen J. Halbrook, of Husch & Eppenberger, Kansas City, Missouri, with him of the briefs), of Husch & Eppenberger, Kansas City, Missouri for the Defendant-Appellee

David T. Greis (William H. Pickett, of William H. Pickett, P.C., Kansas City, Missouri, with him on the briefs), of William H. Pickett, P.C., Kansas City, Missouri, for the Plaintiff-Appellant.

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Before ANDERSON and TACHA, Circuit Judges, and CAMPOS*, Senior District Judge.

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TACHA, Circuit Judge

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## Background

Plaintiff Gretchen Getter brought this diversity action alleging that she sustained personal injuries due to the negligence of defendant Wal-Mart Stores, Inc. Plaintiff alleges that she was injured when she slipped and fell in the vestibule of defendant's store in Atchison, Kansas on December 20, 1989. After a three-day trial, the jury returned a verdict for defendant. Plaintiff then moved for a new trial, and the district court denied the motion. Plaintiff now appeals to this court. We exercise jurisdiction pursuant to 28 U.S.C. §1291 and affirm.

Plaintiff contends that she is entitled to a new trial because the district court erred by (1) denying plaintiff's for cause challenge to prospective juror John Agin, (2) excluding plaintiff's expert witness Keith Vidal, (3) admitting the lay opinion testimony of Emma Jean Bramble and Cynthia Gee, (4) allowing defendant to inquire into whether plaintiff had taken measures to prevent pregnancy, and (5) submitting Jury Instruction No. 11. Plaintiff also alleges that the cumulative effect of these errors unfairly prejudiced her and that the jury's verdict was against the weight of the evidence.

## Denial of For-Cause Challenge to Prospective Juror

"We review the district court's refusal to strike a juror for cause for an abuse of discretion, keeping in

mind that 'the district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair.'" *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994) (citation omitted) (quoting *Wilson v. Johns[on]-Manville Sales Corp.*, 810 F.2d 1358, 1361 (5th Cir.), *cert. denied*, 484 U.S. 828 (1987)). The district court must grant a challenge for cause, however, if a prospective juror shows actual prejudice of bias. *Id.* Actual bias can be shown either by the juror's own admission of bias or "by proof of specific facts which show the juror has such a close connection to the facts at trial that bias is presumed." *Id.*

In our recent *Vasey* decision, we noted that "courts have presumed bias in extraordinary situations where a prospective juror has had a *direct* financial interest in the trial's outcome." *Id.* at 1468. As examples of such extraordinary situations, we cited a case in which a prospective juror was a stockholder in or an employee of a corporation that was a party to the suit. *Id.* (citing *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984); *Francone v. Southern Pac. Co.*, 145 F.2d 732 (5th Cir. 1944)). "In these situations, the relationship between the prospective juror and a party to the lawsuit 'point[s] so sharply to bias in [the] particular juror' that even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." *Id.* (quoting *United States v. Nell*, 526 F.2d 1223, 1229 n. 8 (5th Cir. 1976)).

The challenged prospective juror in this case, John Agin, disclosed during voir dire that he owned stock in defendant corporation and that his wife was the employed by defendant. The district court questioned

Mr. Agin regarding his ability to be a fair and impartial juror in light of his connections to defendant. Mr. Agin responded that he had no doubt that he could be fair and impartial. When later questioned by plaintiff's counsel, Mr. Agin assured counsel that he could support a verdict against defendant if the evidence at trial warranted such a result. Nevertheless, when the district court refused to dismiss Mr. Agin for cause, plaintiff used a peremptory challenge to remove him from the jury.

Despite Mr. Agin's assurances of impartiality, the district court abused its discretion by denying plaintiff's challenge for cause. Due to his stock ownership and his wife's employment, Mr. Agin's financial well-being was to some extent dependent upon defendant's. This is precisely the type of relationship that requires the district court to presume bias and dismiss the prospective juror for cause. *See Vasey*, 29 F.3d 1460; *Gladhill*, 743 F.2d at 1050 (" 'That a stockholder in a company which is [a] party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law.'") (quoting *Chestnut v. Ford Motor Corp.*, 445 F.2d 967, 971 (4th Cir. 1971)).

Having concluded that the district court erred by refusing to grant plaintiff's for-cause challenge to prospective juror Agin, we next must determine whether this error warrants reversal. Plaintiff argues that an erroneous denial of a challenge for cause is reversible error because it forces the litigant to exercise a peremptory challenge. We note that some circuits consider the loss of a peremptory challenge per se reversible error. *See, e.g., United States v. Cambara*, 902 F.2d 144, 147 (1st Cir. 1990) (stating that "restricting a defendant's use of the lawful number of peremptory challenges is reversi-

ble error if a challenge for cause is erroneously denied"); *United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989) ("[T]he denial or impairment of the right to peremptory challenges is reversible error *per se*. . . [It] cannot be dismissed as harmless.") (citations omitted). In our view, however, recent Supreme Court decisions compel the application of harmless error analysis. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). ("[C[ourts should . . .ignore errors that do not affect the essential fairness of the trial.").

In *Ross*, a state court capital punishment case, the trial court erroneously refused to dismiss a juror for cause. As a result, the defendant was forced to use a peremptory challenge to remove the juror. Stating that it had "long recognized that peremptory challenges are not of constitutional dimension," the Court rejected "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. Thus, "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* [1]

The *Ross* Court next examined whether the defendant's right to due process was violated by the juror selection process. Under state law, the defendant was required to use a peremptory challenge to cure the trial court's erroneous refusal to excuse a juror for cause in order to preserve the issue for appeal. *Id.* at 89. Noting that "peremptory challenges are creatures of statute and are not required by the Constitution," *id.*, the Court held that because the defendant "received all that [state] law allowed him, . . . his due process challenged fail[ed],"

*id.* at 91.

In the instant case, plaintiff received all the peremptory challenges allowed by statute. *See* 28 U.S.C. §1870. Thus, applying *Ross*, plaintiff's right to due process was not violated. Because the district court's erroneous denial of plaintiff's for-challenge cause did not violate the Fifth Amendment or the Seventh Amendment, we must examine whether the district court's erroneous denial of plaintiff's for-challenge cause—regardless of its effect on plaintiff's peremptory challenges--was harmless error.

Because the error here is nonconstitutional, we determine whether it was harmless using the standard established in *Kotteakos v. United States*, 328 U.S. 750 (1946). *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990).[2] "A non-constitutional error is harmless unless it had a 'substantial influence' on the outcome [of the trial] or leaves one in 'grave doubt' as to whether it had such effect." *Id.* at 1469 (quoting *Kotteakos*, 328 U.S. at 765).

In this case, the challenged juror did not serve on the jury because plaintiff used a peremptory challenge to remove him. Plaintiff does not allege that the jury as seated was biased. Thus, the district court's refusal to remove Mr. Agin for cause did not have a "substantial influence on the outcome" of the trial, nor does it leave us "in grave doubt as to whether it had such effect." Because plaintiff's right to an impartial jury was not infringed by the district court's erroneous denial of the for-cause challenge, we hold that the error was harmless.[3] See *McIntyre*, 997 F.2d at 698 n. 7.

District Court's Evidentiary Decisions

Plaintiff's second, third, and fourth allegations of error question the trial court's rulings on the admissibility of certain evidence. In general, a district court's rulings on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion. *Ragland v. Shattuck Nat'l Bank*, 36 F.3d 983, 990 (10th Cir. 1994).

Plaintiff first challenges the district court's refusal to allow plaintiff's safety expert to testify. A district court may allow expert testimony "[i]f [the expert's] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. "[A] trial judge's ruling on the admission or exclusion of expert testimony will not be overturned unless it is manifestly erroneous or an abuse of discretion." *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 647 (11th Cir. 1991). Here, the district court excluded plaintiff's proffered expert testimony because "the normal life experiences and qualifications of the jury would permit it to draw its own conclusions concerning the safety of the floor, based upon the lay testimony of eyewitnesses." This ruling was neither manifestly erroneous nor an abuse of discretion.

Plaintiff also argues that defense witnesses Bramble and Gee should not have been permitted to offer their opinions that the vestibule was safe at the time of plaintiff's fall. Each of these witnesses related her eyewitness observations concerning the vestibule's condition. Each witness also opined that the vestibule was safe at the time that plaintiff slipped and fell. The

Federal Rules of Evidence provide that a lay witness may testify in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701. The determination of a lay witness's qualification to testify to a matter of opinion is within the sound discretion of the trial court. *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 847 (10th Cir. 1979). In this case, the testimony of each challenged witness meets the requirements of Rule 701. Accordingly, the district court did not abuse its discretion in allowing Bramble and Gee to offer their opinions.

Plaintiff's remaining evidentiary claim is that the district court erred in permitting defendant to inquire, on cross examination, whether plaintiff had undergone a sterilization procedure to prevent surgery. Plaintiff argues that the inquiry was improper because its probative value was substantially outweighed by the danger of unfair prejudice to plaintiff. *See* Fed. R. Evid. 403. "The decision to exclude (or admit) evidence under [Rule 403] is within the sound discretion of the trial court, and will not be reversed by this court absent a clear abuse of discretion." *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985). When plaintiff objected to this line of questioning at trial, the district court asked both counsel to approach the bench. Defendant argued that the question was relevant because plaintiff's complaint included a claim for lost consortium. While the district court allowed plaintiff to answer the question, the court also admonished defendant not to dwell on the subject. We cannot say that the district court clearly abused its discretion by allowing this evidence.

## Jury Instructions

Plaintiff asserts that Jury Instruction No. 11 was improper because it was duplicative, vague, and confusing to the jury.[4] When reviewing a challenge to jury instructions, we must look at the instructions as a whole to determine whether they properly state the law. *Lutz v. Weld County Sch. Dist. No. 6*, 784 F.2d 340, 341 (10th Cir. 1986) (per curiam). An instruction need not be faultless in every respect. *Id.* The judgment should be disturbed only if we have "a substantial doubt whether the jury was fairly guided in its deliberations." *Id.* (internal quotations omitted). Upon review of the jury instructions as a whole, we conclude that they properly stated the law and fairly guided the jury in its deliberations.

## Cumulative Error and Sufficiency of Evidence

Because we find that only one of the district court's rulings challenged by plaintiff was error, and that the sole error was harmless, plaintiff's allegation of cumulative error fails. "[C]umulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *Rivera*, 900 F.2d at 1471.

Plaintiff's final argument is that the jury verdict is against the weight of the evidence. "A motion for new trial made on the ground that the verdict is against the weight of the evidence normally presents a question of fact and not of law and is addressed to the discretion of the trial court." *Richardson v. City of Albuquerque*,

857 F.2d 727, 730 (10th Cir. 1988). Thus, we review the district court's denial of a motion for new trial on this ground for "a manifest abuse of discretion." *Id.* Our "inquiry focuses on whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." *Black v. Hieb's Enters., Inc.*, 805 F.2d 360, 363 (10th Cir. 1986). In the case at bar, our review of the trial record reveals substantial evidence to support the jury's verdict. Thus, the verdict is not clearly, decidedly, or overwhelmingly against the evidence. We therefore find no abuse of discretion in the district court's denial of plaintiff's motion for a new trial.

## Conclusion

For the reasons stated herein, the judgment of the district court is AFFIRMED.

## FOOTNOTES TO MAJORITY OPINION

1. We recognize that *Ross* was concerned with the Sixth Amendment, not the Seventh amendment, right to trial by jury. In our view, however, the rationale of *Ross* applies by analogy to the instant case. Moreover, there is no reason to believe that the Seventh Amendment would provide a broader right than the Sixth Amendment in this context. *Cf. Colgrove v. Battin*, 413 U.S. 149, 158-60 (19730 (relying on a Sixth Amendment case to sustain the constitutionality of six-member juries in civil trials).

2. This court recently reiterated the appropriateness of the *Kotteakos* standard in *United States v. McIntyre*, 997 F.2d 687, 698 n. 7 (10th Cir. 1993)

("Because the erroneous denial of a for-cause challenge does not rise to the level of a constitutional violation, we apply the harmless error analysis set forth in *Kotteakos*."), *cert. denied*, 114 S. Ct. 736 (1994).

3. We are troubled that one result of our holding may be the creation of a formidable barrier to appellate review of denials of for-cause challenges. Unless a litigant's right to an impartial jury is infringed, erroneous denials of for-cause challenges are probably harmless errors. A litigant who challenges a prospective juror for cause is unlikely to allow such a juror to remain on the jury and will exercise a peremptory challenge. Thus, the litigant will not be able to argue that the jury which decided the case was partial. Of course, there may instances in which a party can show that the erroneous denial of a for-cause challenge substantially affected the outcome of a trial. Such an instance, however, is not before us in this case.

4. The challenged jury instruction is set forth here in full:

> This instruction sets forth the claims of the respective parties, as stated in the case. These claims are not to be considered by you as evidence in the case. The allegations of the respective parties must be established and proved by the evidence.
>
> In this case plaintiff, Gretchen Getter, claims that she was injured and sustained damages as a result of the fault of defendant Wal-Mart Stores, Inc., in one or more of the following respects:
>
> (1) Defendant failed to have mats covering a wet floor in the vestibule of the store;

(2) Defendant failed to replace wet mats in the vestibule in a timely manner;

(3) Defendant failed to eliminate the dangerous condition of wet floors in a timely manner.

The plaintiff bears the burden of proving that her claims are more probably true than not true.

The defendant admits that it operated the Wal-mart Store in Atchison County, Kansas, and that the store had a vestibule on December 20, 1988, for customers to enter and exit. Wal-Mart also admits that Gretchen Getter was a business visitor in its store at the time of the occurrence in question.

The defendant denies all other claims of plaintiff.

*Further, defendant claims that if the plaintiff sustained injury or damages, it was the fault of plaintiff in one or more of the following respects:*

*(1) In failing to keep a proper lookout for her own safety;*

*(2) In failing to look and see what was in plain sight, there being nothing to prevent plaintiff from seeing the floor;*

*(3) In the manner in which she walked through the vestibule area in view of the inclement weather conditions.*

The defendant has the burden of proving that its claims of fault on the part of plaintiff are more probably true than not true.

Plaintiff challenges only the emphasized portion

of the instruction.

CAMPOS, Senior District Judge, concurring in part and dissenting in part.

The majority in this case places pivotal reliance on *Ross v. Oklahoma*, 487 U.S. 81 (1988). While *Ross* and this case may be in the same universe, that of peremptory challenges, these two cases are on different planets and, if not light years, certainly miles and miles apart. And the *Ross* court specifically told us that. The majority's leap from *Ross* does not quite reach the ground on the other side of the chasm where this case rests.

*Ross* involved an Oklahoma state court first-degree murder conviction. Oklahoma law provided nine (9) peremptory challenges to both parties in capital trials. One prospective juror, Huling, responded to questions in a manner which prompted the defense to challenge him for cause. The Oklahoma trial court denied the challenge. The defense then employed his sixth peremptory challenge to dismiss Huling and subsequently exhausted all nine (9) of his peremptory challenges. On appeal, the Oklahoma Court of Criminal Appeals found that the trial court committed error in not dismissing Huling for cause but found, nevertheless, that the error did not warrant reversal:

> The failure of the trial court to remove a prospective juror who unequivocally states that he is unwilling to allow the law during the penalty phase by considering a life sentence is error. The record reflects that defense counsel challenged the prospective juror for cause, and when the court denied the challenge, defense counsel used a peremptory challenge. All of [petitioner's] per-

> emptory challenges were subsequently used; but as there is nothing in the record to show that any juror who sat on the trial we unobjectionable, we are unable to discover any grounds for reversal.

*Ross*, 487 U.S. at 84-85 (quoting *Ross v. State*, 717 P.2d 117, 120 (Okla. Crim. App. 1986) (citations omitted)).

On appeal, the Supreme Court of the United States, in a split 5 to 4 decision, affirmed the decision of the Oklahoma Court of Criminal Appeals. It agreed that the trial court erred when it refused to strike prospective juror Huling for cause. Two thrusts were directed against the decision of the Oklahoma Court of Criminal Appeals upholding the conviction:

1. That Petitioner's right to an impartial jury guaranteed him by the Sixth and Fourteenth Amendments to the Constitution was abridge; and

2. That Petitioner's right to due process under the Fourteenth Amendment was, likewise, abridged.

The Supreme Court addressed, firstly, the claim of infringement of Petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments. The Court concluded: "[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension." *Ross*, 487 U.S. at 88.

Turning to the claim that the refusal to strike for cause violated Petitioner's due process rights under the Fourteenth Amendment, the Supreme Court focused on the law of Oklahoma which it interpreted as conditioned "by the requirement that the defendant must use those challenges *to cure erroneous refusals* by the trial court to excuse jurors for cause. We think there is nothing

arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Ross*, 487 U.S. at 90 (emphasis added).

The Supreme Court clearly and explicitly viewed the peremptory challenge *in the State of Oklahoma* as one burdened with the requirement that it be used "to cure erroneous refusals." It found no impediment in the United States Constitution to peremptory challenges thus burdened by a state statute and state court interpretation in the empaneling of an impartial jury. The *Ross* majority concluded: "As required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory challenges to use in his unfettered discretion. *But he received all that Oklahoma law allowed him, and therefore his due process challenge fails.*" *Ross*, 487 U.S. at 90-91 (emphasis added).

The *Ross* Court did not decide the issue we deal with here not did it intimate what the correct result in this cause should be. This is the leap taken by the majority which, in this case, falls short. Here, the majority citing *Ross* and *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (not a peremptory challenge case), senses a compulsion to apply "harmless error analysis." Whatever compulsion *Ross* imparts to the majority here is misinterpreted and leads it to an erroneous result. In footnote 4 the Supreme Court in terms clear as clearest sky tells us:

> We need not decide the broader question whether, in the absence of Oklahoma's limitation on the "right" to exercise peremptory challenges, "a denial or impairment" of the exercise of per-

emptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause.

*Ross*, 487 U.S. at 91, n. 4.

The case here is the case which presents the "broader question" not addressed and not decided by *Ross*. Here the majority agrees, and I concur wholeheartedly, that the trial court abused discretion in refusing to excuse the prospective juror, John Again, who not only was a stockholder in defendant Wal-Mart, but whose wife was, at the time of trial, an employee of the same Wal-Mart. Abuse of discretion cannot be much clearer than this. Plaintiff here, after challenge for cause was rebuffed, was put to using a peremptory challenge to remove a prospective juror "who should have been excused for cause." The broader question not addressed in *Ross* is thus squarely before us. We cannot close our eyes to it. We cannot tiptoe around it. We cannot fly or jump over it. We cannot burrow under it. And we should not flop the "harmless error" foxhole which sometimes beckons judges when they hear bullets singing about their ears but are unable to tell from where those missiles are launched.

Let us look at "harmless error" and peremptory challenges as they relate to this case and as viewed by the Supreme Court of the United States, this Court, and the Courts of Appeals of other circuits.

Touching "harmless" error, 28 U.S.C. §2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Section 1870 of 28 U.S.C. provides, in part,

that "[i]n civil cases each party shall be entitled to three peremptory challenges.

We are dealing here with a right created and given to a party by the Congress of the United States. It is not a right created by a state legislature and molded by interpretation of state courts as the United States Supreme Court found Oklahoma had done in *Ross*. It is not a right created by a federal court. True enough, under 28 U.S.C. §1870, several defendants or several plaintiffs may be considered as a single party for purposes of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. But the right to a peremptory challenge in the federal courts emanates from a source of governmental power apart from the judiciary. The fountain of this right is the United States Congress.

The "broader question" which the *Ross* majority specifically avoided must be addressed and answered here. Simply stated, it is this: Is the right to a peremptory challenge under 28 U.S.C. §1870 one of the "substantial rights of the parties" under 28 U.S.C. §2111? The conclusion that it must be, and that it is, is attested by federal case law from very early on. Perhaps the best exposition of the history, nature and character of the right to challenge peremptorily is contained in yet viable remains of *Swain v Alabama*, 380 U.S. 202 (1965). Observations touching the peremptory challenge are as pertinent, as timely and as revealing of the essence of this "right" today as they were before and after *Swain* was modified in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* only overruled *Swain* to the extent that it prohibits the exercise of a peremptory challenge for reasons which violate the equal protection

guarantee of the Constitution. Mr. Justice White from the *Swain* Court wrote of the peremptory challenge. His words reveal the essence of the peremptory challenge as provided in congressional enactments relating to the rights of litigants in the trial of both criminal and civil cases:

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. Although '[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,' nevertheless the challenge is 'one of the most important of the rights secured to the accused.' *The denial or impairment of the right is reversible error without a showing of prejudice.* 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'
>
> * * *
>
> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' upon a juror's

> 'habits or associations,' or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment.' (Emphasis added.)

*Swain v. Alabama*, 380 U.S. at 219, 220.

*Batson*, while placing equal protection strictures on peremptory challenges, nevertheless clearly recognized important inherent values in litigants' fair trial rights in the challenge: "While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedure, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice." *Batson*, 476 U.S. at 98-99.

This Court has long perceive the important dimension and rock hard substance of the peremptory challenge. Judge Murrah, for the court, in *United States v. Chapman*, 158 F.2d 417 (10th Cir. 1946) addressed the issue. While announcing that error in *excusing* or *discharging* a qualified juror was not reversible error he found that the refusal to sustain a challenge for cause was error in that case and that such error required reversal. *Id.* at 421.

Judge Breitenstein, while finding that the trial judge did not abuse discretion in denying challenges for cause, noted that "generally an improper denial of a challenge for cause is error as it forces a party to use a peremptory challenge." *Hopkins v. County of Laramie, Wyo.*, 730 F.2d 603, 605 (10th Cir. 1984).

The majority opinion in this case, in addition to misinterpreting *Ross*, stands at the opposite pole from holdings in other circuits.

We read the long line of Supreme Court

> authority that culminated in *Swain* to say that the denial or impairment of the right to peremptory challenges is reversible error *per se*. ("Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.") The impairment of this right, therefore, cannot be dismissed as harmless.

*United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989) (citations omitted). The Seventh Circuit has followed the Third Circuit in this respect, stating that "[i]t is reversible error to deny a party to a jury trial the peremptory challenges to which the rules of procedure entitle him, although it will rarely if ever be possible to show that the trial would have come out differently with a different jury." *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990).

Somehow and somewhere, out of the swirls and whirls of twenty-five (25) pages of majority opinion and three (3) pages of dissent in *Kotteakos v. United States*, 328 U.S. 750 (1946), a conclusion seems to have been reached that, usually, unless the error is one of constitutional dimension, a "harmless error" analysis must be engaged. Thus, the majority relies on *Kotteakos* in support of its foray into harmless error. The majority further girds its harmless error analysis by reminding us that this Court has recently given a nod of approval to *Kotteakos* in *United States v. McIntyre*, 997 F.2d 687, 698 n. 7 (10th Cir. 1993).

In *McIntyre*, this Court held that, in that case, "the refusal to grant a for-cause dismissal was not an abuse of discretion." 997 F.2d at 698. It is to this holding that footnote 7 is appended. Footnote 7 from

*McIntyre* reads in part:

> The Supreme Court in *Ross v. Oklahoma*, 487 U.S. 881, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988), held that there is no violation of either the Sixth or Fourteenth Amendments when a trial court has erroneously denied a for-cause challenge and the juror is subsequently struck through the use of a peremptory challenge. The Court concluded that "the loss of a peremptory challenge [does not] constitute[ ] a violation of the constitutional right to an impartial jury." *Id.* at 88, 108 S. Ct. at 2278. "Any claim that the jury was not impartial...must focus...on the jurors who ultimately sat." *Id.* at 86, 108 S. Ct. at 2277. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88, 108 S. Ct. at 2278. Subsequent opinions of the Tenth circuit have reached similar conclusions. Because the erroneous denial of a for-cause challenge does not rise to the level of a constitutional violation, we apply the harmless error analysis set forth in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). "A non-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect.' *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (citing *Kotteakos*, 328 U.S. at 765, 66 S. Ct. at 1248). In the instant case the defendant does not allege that the use of peremptory challenges on this juror resulted in an impar-

> tial jury or disadvantaged him in any way. Accordingly, we find that even if the for-cause challenge was improperly denied, any error resulting therefrom was harmless.

*Id.* at n. 7. At least the following need be said about this footnote:

1. The observations relating to *Ross* are *obiter dicta* not necessary whatever to the holding that the trial court did not abuse discretion by refusing to grant a for-cause challenge.

2. The interpretation of *Ross* suffers from the same infirmity which has been treated and demonstrated above.

3. If published opinions of the Tenth Circuit between *Ross* (1988) and *McIntyre* (1993) have reached the conclusions set forth in the footnote, as the *McIntyre* court claims, the writer herein has been unable to locate them.[1]

And it is pertinent to point out that *Kotteakos*, *supra*, decided in 1946, did not move the Supreme Court speaking through Mr. Justice White in 1965 to engage the "harmless error" analysis when *Swain*, *supra*, was decided.

The "harmless error" analysis requires a party, in the "non-constitutional error" context, to make a showing that the error had a "substantial influence" on the outcome or leaves one in 'grave doubt" as to whether it had such effect. *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). In the peremptory challenge scenario a party thus make a showing that while one set of juror brains decided against it a set of slightly different juror brains would have decided for it. The processes and means for making such a showing are, of course,

non-existent. Thus, at the starting line this formulation forces a party to hit the impregnable wall before the starting gun goes off. This is sophistry.

My conclusion is twofold. First, I believe that losing a peremptory challenge because of an erroneous refusal to excuse for cause is a deprivation of property without due process of law in contravention of the Fifth Amendment. It impacts upon the processing of the litigant's cause of action, the litigant's "property," in a federal court. Thus, I would not engage in a harmless error analysis as the majority does. Second, if an erroneous denial of a challenge for cause does not implicate the Fifth Amendment, still the peremptory challenge accorded litigants in 28 U.S.C. §1870 is, nevertheless, a statutory right or privilege which carries with it all the essence, stature and dignity of the "substantial rights" which are the subject of 28 U.S.C. §2111. History and law teach that it has a right place in and marches with that company. When a party is put to exhausting all peremptory challenges, one of which is used to remedy an erroneous denial of a challenge for cause, as occurred in this case, such ruling denigrates and diminishes this statutory right and is, therefore, reversible error.

The majority does not dedicate the mildest whisper as to whether the erroneous denial of a challenge for cause which deprives a party of a peremptory challenge in a federal jury trial touches the Fifth Amendment, 28 U.S.C. §2111, or 28 U.S.C. §1870. I am convinced it does and I, therefore, dissent on the peremptory challenge issue. Because I would reverse and grant a new trial on this issue, I do not reach the other issues decided in the majority opinion.

## FOOTNOTES TO DISSENT

1. A pre-*McIntyre* unpublished opinion, *Scales v. Norton*, No. 92-1008, 1992 WL 150088 at *1 (10th Cir. June 24, 1992), without citation or analysis, contains the assertion that "the loss of a peremptory challenge that might have been exercised elsewhere is not constitutional error justifying overturning a state court conviction." Another unpublished opinion, *Isiah v. Tansy*, No. 93-2183, 1994 WL 237499, at *3 (10th Cir. June 3, 1994), states the same proposition and cites *Ross* and *McIntyre* as supporting it. *Isiah* is post-*McIntyre* and thus could not be one of the cases which supports the *McIntyre* footnote 7 assertion. *Scales* and *Isiah* involve state convictions and are thus inapposite in the present case. Notwithstanding the fact that these cases hold that, in state court trials, the loss of a peremptory challenge through trial court error does not constitute a violation of the constitutional right to an impartial jury, they do not address the issue as to whether in a federal court such a deprivation constitutes reversible error because it deprives a party of a "substantial right" under 28 U.S.C. § 2111.

2. Except for the Fifth Amendment observations in the last two paragraphs herein, this partial dissent was drafted April 18, 1995. On August 29, 1995, the writer learned that the Third Circuit had issued its opinion, on July 27, 1995, in *Kirk v. Raymark Industries, Inc.*, Nos. 94-1745, 94-1746, 1995 WL 442611 (3rd Cir. July 27, 1995). Except for the writer's views on the Fifth Amendment, which *Kirk* does not treat, *Kirk* and this partial dissent are on precisely the same track regarding *Ross* and its non-applicability to erroneous

denials of challenges for cause in a jury trial in federal court.

***GETTER v. WAL-MART STORES, INC.***
**District Court No. 92-2005-KEV**
**Excerpt from Trial Transcript**
**Vol. 1, pages 11-12**

THE COURT: Have any members of your immediate family ever owned stock in Wal-mart that you know of or been formerly associated or employed by Wal-Mart?

Mr. Agin?

VENIREMAN AGIN: Yes. My wife works for Wal-Mart. I own stock in Wal-Mart.

THE COURT: You're now a stockholder in Wal-Mart?

VENIREMAN AGIN: Yes.

THE COURT: Is your wife currently employed by Wal-Mart?

VENIREMAN AGIN: Yes.

THE COURT: Would that give you any problem sitting as a fair and impartial juror in this case?

VENIREMAN AGIN: No. I have biases both for and against Wal-Mart, knowing what I know about it.

THE COURT: Do you feel that you could give equal weight to the testimony of Wal-mart employees, and you wouldn't give that undue weight for or against what they might say, given the fact that you do have a financial interest in this?

VENIREMAN AGIN: No.

***GETTER v. WAL-MART STORES, INC.***
**District Court No. 92-2005-KEV**
**Excerpt from Trial Transcript**
**Vol. 1, pages 33-37**

THE COURT: At this point we need to find out a little more in detailed information about you as individuals. The counsel and the Court have been supplied with only three bits of information, and one is your name, the other is your home town, and we know what your job is or what your job was if you were employed at the time that the you completed the information forms.

So what I'd like to do is ask each of you in turn to just tell the Court and the counsel and the parties a little bit about your personal background. This is the only speaking role which you will have in this jury trial, and I don't want you to feel that you need to give a fancy speech or that you are going to be, we're certainly not giving you any prizes, but would you just tell us conversationally, if you would, a little bit about where you live, what you do for your living, your family, whether your spouse is employed, what they do, and if you have any specialized knowledge about law, medicine, safety issues, insurance industry, nursing, physical therapy, anything like that, or any history in those areas, please bring that up, too.

NOTE: The above excerpt is from pages 33-34. The remainder of page 34 through line 13 on page 36 consists of comments from Veniremen Brummell and Bolin in response to the District Court's question.

The excerpt below begins on page 36 and ends on page 37 of the transcript.

THE COURT. Mr. Agin. Am I pronouncing your name right?

VENIREMAN AGIN: Yes.

THE COURT: Thank you.

VENIREMAN AGIN: I live in Lawrence, and I have been employed the last five years at—last regular job Electronic Techniques. I am not currently working.

I am married. My wife is head sales clerk, works at Wal-Mart. Four years of college. Two stepchildren that are grown. One lives in Lawrence, the other in Overland Park, I believe. Manager of a fast food restaurant. The other one works in a hospital in the food department.

THE COURT: Okay. And how long has your wife worked at Wal-Mart?

VENIREMAN AGIN: Ten years

***GETTER v. WAL-MART STORES, INC.***
**District Court No. 92-2005-KEV**
**Excerpt from Trial Transcript**
**Vol. 1, page 69**

THE COURT: Are there any other motions?

MR. PICKETT (Mrs. Getter's counsel): Yes, Your Honor. Out of an abundance of caution as well, we have another juror, Mr. John Agin, who is a stockholder, his wife is a stockholder, his wife is an employee for ten years.

I believe that you made the comment to the companion sitting next to him, I forget her name, of having to proceed on the side of caution.

I think we have the same situation here where a person is an employee or stockholder of a public corporation and his wife is an employee.

For all those reasons, I think that you should exercise your discretion and strike for cause.

MR. CLEARY (Wal-Mart's counsel): There's nothing in what the man said that would cause anyone to think he would be anything less than a fair and impartial juror and the fact that he may own stock in Wal-Mart and his wife may own stock in Wal-Mart and the fact she works for Wal-Mart doesn't indicate that he would be prejudiced in this case and he hasn't said he would be. He said, as a matter of fact, he wouldn't be.

THE COURT: I am going to leave him on.